No. 745

In the Supreme Court of the United States

OCTOBER TERM, 1958

ERLE N. JACOBS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 545.

FRED N. ACKER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 36a–41a)[1] are not officially reported. The opinion of the Court of Appeals (Pet. 13–23) is reported at 258 F. 2d 568.

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 1958. (Pet. 24.) The taxpayer's petition for rehearing was denied on September 3, 1958. (Pet. 24–27.) The petition for a writ of certiorari was filed on December 1, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

[1] Record references are to the separately printed appendix to the taxpayer's brief in the Court of Appeals.

QUESTIONS PRESENTED

1. Whether the court below correctly decided that the Internal Revenue Code of 1939 is not unconstitutional because of its progressive rates of taxation and further that such rates are not excessive or arbitrary within the meaning of the Fifth Amendment to the Constitution.

2. Whether the court below correctly decided that Section 294 (d) (1) (A) of the Internal Revenue Code of 1939, which imposes an addition to the tax for failure to file a declaration of estimated income tax required by Section 58 of the Code, is not unconstitutional.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 294. ADDITIONS TO THE TAX IN CASE OF NON-PAYMENT

* * * * *

(d) [As added by Section 118 (a) of the Revenue Act of 1943, c. 63, 58 Stat. 21] *Estimated Tax.*—

(1) *Failure to file declaration or pay installment of estimated tax.*—

(A) *Failure to File Declaration.*—In the case of a failure to make and file a declaration of estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect, there shall be added to the tax 5 percentum of each installment due but unpaid, and in addition, with respect to each

such installment due but unpaid, 1 per centum of the unpaid amount thereof for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any installment due but unpaid, exceed 10 per centum of the unpaid portion of such installment. * * *

* * * * * *

(26 U. S. C. 294.)

STATEMENT

The Commissioner has filed a petition for a writ of certiorari in this same case, No. 553, this Term. The question presented by that petition, however, is unrelated to the questions presented by this petition. In No. 553, the question is whether, where a taxpayer has failed to file a declaration of estimated income tax as required by Section 58 of the Internal Revenue Code of 1939, the Commissioner may impose concurrently an addition to the tax under Section 294 (d) (2) of the Code for substantial underestimation of tax, as well as an addition under Section 294 (d) (1) (A) for failure to file a declaration.

The facts pertinent to the questions raised in this petition may be stated as follows:

The respondent determined the net income and tax liability of the petitioner for the years 1947 to 1950 as follows (R. 11a–15a):

	Income	Tax	Penalty
1947	$9,412.30	$1,552.01	$636.32
1948	15,968.13	3,565.38	1,290.01
1949	9,047.73	1,664.60	583.95
1950	15,862.18	4,400.43	231.04

The penalties included additions for failure to file a declaration of estimated income tax for each of the years involved.

The petitioner petitioned the Tax Court for redetermination (R. 2a–7a) and that court upheld the determination of the Commissioner (R. 36a–41a).

On appeal to the Court of Appeals for the Sixth Circuit, the petitioner, in addition to challenging the validity of the determinations of deficiencies, also asserted the unconstitutionality of the provision requiring a declaration of estimated tax and of a progressive income tax generally. The court below upheld the constitutionality of the tax law in both respects (Pet. App. 13–27).

ARGUMENT

The decision below, insofar as it pertains to the questions presented by this petition, is correct and there is no conflict of decisions.

1. The claim that the Internal Revenue Code of 1939 is unconstitutional because it provides for progressive rates of taxation, and, further, because such rates are allegedly excessive and arbitrary (Pet. 8–12), is plainly without substance. As this Court said in *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, 25:

> It is true that it is elaborately insisted that although there be no express constitutional pro-

> vision prohibiting it, the progressive feature of the tax causes it to transcend the conception of all taxation and to be a mere arbitrary abuse of power which must be treated as wanting in due process. But the proposition disregards the fact that in the very early history of the Government a progressive tax was imposed by Congress and that such authority was exerted in some if not all of the various income taxes enacted prior to 1894 to which we have previously adverted. And over and above all this the contention but disregards the further fact that its absolute want of foundation in reason was plainly pointed out in *Knowlton* v. *Moore, supra,* and the right to urge it was necessarily foreclosed by the ruling in that case made.

Plainly, Congress has the power to levy the income tax. Constitution, Amendment XVI. "When the power to tax exists, the extent of the burden is a matter for the discretion of the lawmakers." *Fox* v. *Standard Oil Co.,* 294 U. S. 87, 99. To violate the Constitution, the burden must be so arbitrary as to amount to a confiscation of property. *Brushaber* v. *Union Pacific R. Co., supra,* pp. 24–25; *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 585; *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218, 223. There has not been a showing here that the rates are so arbitrary as to amount to a confiscation of property. The taxpayer's assertion that the rates are unconstitutionally excessive and arbitrary is apparently based on the assumption that his claimed deductions are allowable (but clearly they are not) and that the nation can do without high taxes (Pet. 3, 8–12). As the court below indicated (Pet. 23), although the rates imposed by

the 1939 Code are high, they have not reached "confiscation" or a "taking" in the constitutional sense.

2. In rejecting taxpayer's claim that Section 294 (d) (1) (A), *supra*, p. 2, is unconstitutional, the court below observed that the taxpayer's attack upon the constitutionality of the provisions of the Internal Revenue Code of 1939 requiring the filing of a declaration of estimated tax (Section 58) and imposing an addition to the tax for failure to file (Section 294 (d) (1) (A)) is "wholly without merit", citing two cases in which this Court recently denied certiorari. *Erwin* v. *Granquist*, 253 F. 2d 26 (C. A. 9th), certiorari denied, 356 U. S. 960; *Walker* v. *United States*, 240 F. 2d 601 (C. A. 5th), certiorari denied, 354 U. S. 939. In those cases, arguments similar to the ones that have been advanced by this taxpayer were rejected by the Ninth and Fifth Circuits, respectively. And in *Helvering* v. *Mitchell*, 303 U. S. 391, 399, this Court said:

> As stated in *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320, 339:
>
> > In accord with this settled judicial construction, the legislation of Congress from the beginning, not only as to tariff but as to internal revenue, taxation and other subjects, has proceeded on the conception that it was within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power.

Thus, as the court below observed (Pet. 16), the provisions of the Code here under attack are a valid exercise of the taxing power conferred by Article 1, Section 8, and the Sixteenth Amendment to the Constitution.

CONCLUSION

The decision below pertaining to the questions raised by this petition is correct and no other reason appears for further review by this Court. Therefore, the petition should be denied.

Respectfully submitted,

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